

(1990) 07 KL CK 0024

In the High Court Of Kerala

Case No : O.P. No. 3168 of 1990-B

Kaekkandi Choyi and Another

APPELLANT

Vs

Ayimbadi Meethal Amoo and Others

RESPONDENT

Date of Decision : 25-07-1990

Acts Referred:

Kerala Buildings (Lease and Rent Control) Act, 1965 — Section 11(3), 18, 20, 20

Citation : AIR 1991 Ker 145 : (1991) 1 ILR (Ker) 42

Hon'ble Judges : V.S. Malimath, C.J;T.L. Viswanatha Iyer, J

Bench : Division Bench

Advocate : V.P. Mohan Kumar, for the Appellant;

Final Decision : Dismissed

Judgement

Malimath, C.J.—This is the tenants' writ petition challenging the order made by the District Judge, Kozhikode, in Rent Control Revision Petition No. 100 of 1986. This case has come up before us on a reference made by Justice Chettur Sankaran Nair on the ground that an important question as to whether the District Judge acting as a revisional authority under the Kerala Buildings (Lease and Rent Control) Act, 1965 (Act 2 of 1965) (hereinafter referred to as the Act), having set aside the order of the Appellate Authority finding that in the meanwhile the Court of the Subordinate Judge has ceased to be the Appellate Authority can himself record findings as an Appellate Authority.

2. The relevant facts necessary for the disposal of this case may briefly be stated as follows: Respondents 1 to 6 made an application before the Court of Rent Controller, Payyoli, for eviction of the petitioners, invoking Sections 11(2), 11(3) and 11(4)(i) of the Act. The Rent Control Court by its order dated 30th March, 1985 dismissed the petition. On appeal, the Subordinate Judge, who was then the Appellate Authority, dismissed the appeal holding that the petition for eviction is barred under the proviso to Section 11(3) of the Act, the petition for eviction having been filed within a period of less than one year from the date of acquiring the right to recover possession under an instrument of transfer inter

vivos. In view of the said finding, the other findings recorded by the Rent Controller were not examined. The landlords then challenged the said order before the Revisional Authority, the District Judge, u/s 20 of the Act. The Revisional Authority reversed the finding of the Appellate Authority and held that the application is not barred by the proviso to Section 11(3) of the Act and that it is maintainable. Having come to that conclusion, the Revisional Authority felt that the only course open to it is to remit the case to the Appellate Authority, having regard to the powers conferred on it in this behalf by Section 20A of the Act. By the time the revisional authority rendered its decision, the Court of Subordinate Judge which was notified as an Appellate Authority u/s 18 of the Act had ceased to be an Appellate Authority, the District Judge having been notified as an Appellate Authority by notification dated 31-8-1989. The Revisional Authority says that he cannot remand the case to the Subordinate Judge who was earlier notified as an Appellate Authority as he has ceased to be the Appellate Authority, from the aforesaid date. Being confronted with a situation like this of not being able to remand the case to a nonexistent Appellate Authority, the revisional authority came to the conclusion that it now having become the Appellate Authority under the aforesaid notification issued by the State Government notifying the District Judge as an Appellate Authority, he can himself exercise the powers of the Appellate Authority and record findings on those issues on which the Appellate Authority had not recorded its findings. So saying, the District Judge purporting to function as the Appellate Authority records findings on the other issues on which the Rent Control Court had recorded findings against the landlords. The only matter on which the parties joined issue was the claim of the landlords for eviction on the ground of bona fide need. Reversing the findings of the Rent Control Court, the learned District Judge held that the requirement of the landlords is bona fide and that the tenants have failed to establish that they are dependent for their livelihood mainly from the income derived from the business they are carrying on in these premises. In view of these findings, the order of eviction has been passed. It is the said decision that is challenged in this writ petition.

3. Shri Mohankumar, the learned counsel appearing for the petitioners formulated three contentions in support of his contentions, namely, (1) that the finding in the impugned order that the application for eviction is not barred by the proviso to Section 11(3) of the Act is not in accordance with law, (2) that the finding regarding bona fide requirement of the landlords is vitiated by errors apparent on the face of the record and cannot be sustained, and (3) that the revisional Court could not have functioned both as a revisional Court as also as an Appellate Authority, as it purports to have done in the impugned order.

4. The finding recorded by the revisional Authority on the first point that the deed of partition is not transaction of transfer inter vivos and that therefore the acquisition of right to recover possession under a partition deed by the landlords does not attract the bar engrafted in the proviso to Section 11(3) of the Act. The view taken by the revisional authority, in our opinion, is sound. The bar is

attracted only when the right to recover possession arises under an instrument of transfer inter vivos. When a party acquires a right to exclusive possession under a deed of partition, there is no transfer of rights inter vivos in his favour as he had already a right along with the others in that property. It is well settled that a partition is not a transfer inter vivos. Hence the finding of the revisional authority does not call for interference.

5. It was however contended by Sri Mohankumar, the learned counsel for the petitioners, that the joint family itself has acquired the right in the property within a period of one year from the date of application and therefore the bar contained in the proviso to Section 11(3) of the Act is attracted. It has to be pointed out that there is no specific plea raised in the Statement of Objections filed by the petitioner in the Rent Control Court in this behalf. It is no doubt true that an issue has been framed and the parties have joined issue in regard to the operation of the bar contained in the proviso to Section 11(3) of the Act. But on a perusal of the judgment of the Rent Control Court, we find that the parties joined issue in regard to acquisition of right under a deed of partition. It was not put in issue that the Joint Family itself acquired title to the property in question within a period of one year from the date of application. Such a contention is not seen urged before the revisional authority. It is therefore clear that it was not the case of the petitioners that the bar is attracted because the Joint Family itself acquired the title to the property in question within one year from the date of filing of the application. Hence we will not be justified in permitting the new contention sought to be raised for the first time in this writ petition, particularly when it is a question of fact that needs investigation of new facts. Hence the new contention sought to be raised in this writ petition cannot be permitted to be raised.

6. The second point which was urged was that the discussion in the judgment under challenge indicates that it was for the appellant-tenants to establish that the requirements of the landlords is not bona fide. On a proper reading of the judgment, it is not possible to take the view that that is how the revisional authority has proceeded to deal with the issue. If we read the judgment as a whole, it becomes clear that the landlords having made out a prima facie case about their requirement being bona fide, the case of the tenants was examined and a finding was recorded to the effect that the landlords have established that their requirement is bona fide. When both the parties have led evidence in regard to this aspect of the matter of the question of burden of proof does not assume much importance. It is also necessary to point out that when the landlord asserts that his requirement is bona fide, the tenant may place materials and circumstances to show that the requirement is not bona fide. It is from this angle that the evidence has been assessed in the impugned judgment. The finding of fact has been appropriately arrived at on a consideration of the facts and circumstances of the case in the impugned judgment and the same does not suffer from any errors apparent on the face of the record.

7. On the third point, it was contended by Sri Mohan Kumar that the additional District Judge whose jurisdiction was invoked by the landlords as a revisional authority u/s 20 of the Act could not have functioned both as a revisional authority as also as an appellate authority. The manner in which the additional District Judge has dealt with the matter has given scope for such an argument. This is what has been stated in the impugned order:

"In view of my finding on point No. 1 I would have invoked Section 20A of Kerala Act 2 of 1965 and remanded the matter to the Appellate Authority for entering findings on the merits of the case. But, as per notification published in the Gazette date 26-9-1989, the Government of Kerala, in supersession of all the earlier notifications has nominated the District Judges to be the Appellate Authorities u/s 18 of the Kerala Act 2 of 1965. The result of this notification is that Subordinate Judges have ceased to be Appellate Authorities. Hence this is a case where this Court sitting in revision cannot the matter to the Subordinate Judge from whose decision as Appellate Authority, this revision arose. Now that this Court is itself the Appellate Authority, the matter will have to be considered on merits by this Court. I therefore propose to decide point No. 2 on the merits."

Merely because Section 20A of the Act confers powers of remand on the revisional authority it does not mean that that power must be exercised in every case, whenever appropriate findings on the relevant issues have not been recorded by the Appellate Authority. It is well settled that as far as possible remanding of the case by the superior Court to the lower Court or authority should be avoided and necessary findings (be) recorded by the very same Court or authority to avoid unnecessary protraction of the litigation. In this case, the revisional authority need not have felt helpless on the ground that it cannot remand the case to the subordinate Judge he having ceased to be an appellate authority. The revisional authority could have itself recorded relevant findings on merits on the issues on which the findings were not recorded by the Appellate Authority. That is the permissible and also the appropriate course to be adopted in such circumstances. As a matter of fact, the Additional District Judge in this case has himself recorded finding on merits, though purporting to sit in the chair of the Appellate Authority and not in the chair of the revisional authority. This is a wholly unnecessary and futile exercise as he could do the same as a revisional authority. Though the Additional District Judge purports to have recorded the findings sitting in the chair of the Appellate Authority, as we have come to the conclusion that the very same authority could have recorded those findings, the findings of the Additional District Judge on merits should be treated as having been recorded by the revisional authority. The findings recorded in the impugned order do not suffer from any errors apparent on the face of the record justifying interference. Thus we find no good grounds to interfere.

8. Shri Mohankumar, the learned counsel appearing for the petitioners, however, requested for reasonable time for vacation of the premises. After hearing the counsel for the respondents, Shri Suresh, we consider it just and proper to grant

time to the petitioners to vacate the premises till 31st of March, 1991 on condition that they give a written undertaking within three weeks from this date to the effect that they will voluntarily and unconditionally surrender possession before the expiry of the time granted. In the event of the petitioners not giving an undertaking within the time specified as above, they will not be entitled to any time for vacating and the respondents-landlords would be entitled to execute the order for eviction.

Subject to the time granted for vacating the premises as above, this writ petition is dismissed. No costs.

Let a copy of this judgment be forwarded to the Rent Control immediately.